

The claimant requested medical treatment for an alleged May 17, 2007 back injury. The respondent disputed that the claimant injured his back in the course and scope of employment and that the claimant provided timely notice of injury.

The claimant testified that on May 17, 2007 he injured his low back from lifting paving stones at work. He said that he reported the injury to supervisor, Steven Burnett that day.

Steven Burnett testified that sometime in May, 2007 the claimant reported to him that he had hurt his back using a sledgehammer at home. Burnett said that several weeks later he heard through other individuals at work that the claimant was alleging a work related back injury.

The claimant first sought medical treatment for the alleged injury through his personal physician, Dr. Parris. Dr. Parris testified that at the claimant's first appointment regarding the back injury, May 30, 2007, the claimant reported that he had injured his back on May 27, 2007, a Sunday, using a sledgehammer. Parris said the claimant first mentioned a work-related component to his back injury on July 2, 2007.

The preponderance of the evidence proved the claimant's back injury arose from using a sledgehammer at home rather than from his work duties. The claimant failed to prove an injury arising out of and in the course of employment. The whole record tended to corroborate Burnett's version of events, and tended to contradict the claimant's version. The claimant also failed to prove by a preponderance of the evidence that he reported the alleged injury within 10 days as required by K.S.A. 44-520. The claimant's request for medical benefits is, therefore, denied.<sup>1</sup>

Claimant contends Judge Hursh erred and the September 17, 2007, Order should be reversed. As the Judge referred only to a May 17, 2007, accident, claimant argues the Judge erroneously believed that was the only date of accident being claimed and, therefore, the Judge did not consider the evidence that claimant continued to injure his back each day he worked following that date and following the intervening sledgehammer incident. In short, claimant argues the evidence proves he injured his low back through the last day he worked for respondent and that he provided respondent with timely notice of his low back injury.

Conversely, respondent argues the preliminary hearing Order should be affirmed. Respondent contends claimant fabricated the story about hurting his back at work on May 17, 2007, as the medical records from his first two doctor visits following that date indicate claimant's symptoms were related to a sledgehammer incident at home. Moreover, respondent points out that claimant's initial medical bills were forwarded to his private health insurance carrier. Respondent also disputes claimant's testimony that he told his supervisor, Steven Burnett, on May 17, 2007, he had hurt his back at work. Furthermore, respondent contends claimant did not injure his back at work following the

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<sup>1</sup> ALJ Order (Sept. 17, 2007) at 1, 2.

sledgehammer incident at home because claimant had already been given lighter work duties. Finally, because claimant applied for unemployment benefits, respondent argues the Board can infer claimant knew he would be denied temporary total disability benefits in this claim for failing to report a work-related accident.

The issues before the Board on this appeal are:

1. Did claimant prove he injured his low back working for respondent in an accident that arose out of and in the course of his employment?
2. If so, did claimant prove he provided respondent with timely notice of that accident or injury?
3. If so, did respondent establish that claimant sustained an intervening low back injury that would free it from being responsible for providing workers compensation benefits to claimant?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds as follows:

Claimant needs medical treatment for low back pain that radiates down his left leg past his knee. An MRI that was done on June 20, 2007, indicated claimant has a disk protrusion between the fifth lumbar and first sacral vertebrae (L5-S1). One of the principal issues in this claim is whether claimant's present back injury was caused by the heavy lifting and repetitive bending he performed at work for respondent or, instead, whether it was caused by an incident at home driving a garden stake into the ground with a two-pound hammer.

Claimant is a union bricklayer. In May 2007, claimant was working for respondent at the Liberty War Memorial moving and handling 280-pound concrete pavers. Claimant testified his present low back problems began at work on May 17, 2007, while moving a paver, when his back gave out and he experienced immediate low back pain that radiated into his left leg. Claimant testified he reported the incident the same day it occurred to his supervisor, Steven Burnett, who then gave claimant lighter work duties. Claimant continued working for respondent.

On May 27, 2007, however, claimant experienced an incident at home that increased his low back pain. On that date, claimant was using a two-pound hammer to drive a thin wooden lathe into the ground to use as a garden stake. The lathe was approximately 14 to 18 inches long, two inches wide, and one-quarter to three-eighths of

an inch thick. Claimant testified driving the lathe into the ground did not require much force. That incident, nonetheless, made claimant realize the injury he sustained at work was something more than merely a muscle strain.

According to claimant, as he continued to work for respondent his symptoms increased until he was unable to continue working. At his August 2007 deposition, claimant identified June 26, 2007, as the last day he worked for respondent. The record indicates that after the work ended at the Liberty War Memorial claimant began working on a waterproofing project at a college. That work, which claimant testified he performed during his last five days of working for respondent, required claimant to carry two 50-pound buckets of hot rubber down into an excavated area before applying the hot rubber to a building's foundation. Claimant testified that work increased his back symptoms.

It is uncontradicted claimant advised his supervisor on the waterproofing project, Rick Moody, that his symptoms were worsening and that he was in so much pain he could hardly do that work anymore. Likewise, it is uncontradicted claimant told the superintendent on that project, Bill Barlow, that he had injured his back and leg at work and he did not know how much longer he could continue working. Mr. Barlow then suggested that claimant be laid off work and allowed time to heal.

After his last day of work, claimant spoke with Matt Dirks, who was identified as being either one of respondent's owners or corporate officers. Claimant allegedly told Mr. Dirks about hurting his back at work and was allegedly told to see his personal physician.

Respondent's version of the facts surrounding this claim are quite different from claimant's. Respondent contends claimant fabricated the May 17, 2007, lifting incident and also fabricated his story about giving notice of the incident to Mr. Burnett. At the preliminary hearing, Mr. Burnett testified he knew claimant's back was hurting but that claimant attributed his symptoms to swinging a sledgehammer at home. Mr. Burnett testified he did not learn claimant was alleging a work injury until receiving a telephone call from either respondent's insurance fund or a corporate officer.

Mr. Burnett does acknowledge, however, the work at the Liberty War Memorial was very heavy work and that even after the hammer incident, claimant complained that lifting pavers was aggravating his low back and making it worse. Mr. Burnett testified, in part:

Q. (Mr. Phalen) You will admit that you made comments to my client to the effect, and I'm paraphrasing, something to the effect that, here, let me do that for you because your back is hurt?

A. (Mr. Burnett) Yes.

Q. You will admit that he told you that the work was aggravating his low back injury?

A. Lifting the pavers, yes.

Q. And that was after May 17?

A. Yes.

Q. That was after the sledge hammer incident, also?

A. Yes.<sup>2</sup>

In addition, the lighter work that Mr. Burnett assigned claimant required a lot of bending at the waist. Mr. Burnett acknowledges that claimant's back was hurting the whole time he performed the lighter work.

Respondent asserts the medical records from claimant's personal physician further support its claim that claimant fabricated the May 17, 2007, lifting incident. Claimant, who underwent back surgery in both 1988 and 1993, did not seek medical treatment for the back injury alleged in this claim until May 30, 2007, when he saw his personal physician, Dr. R. David Parris. Dr. Parris, who practices with the Mercy Physician Group, testified his medical group is paperless. Nevertheless, at his deposition the doctor created paper copies of the progress notes that were generated when he saw claimant in May, June, and July 2007.

Claimant saw Dr. Parris on May 30, 2007, for his alleged low back injury. The doctor's progress notes from that day indicate claimant had been working with a sledgehammer on May 27, 2007, when he felt a strain in his lower back. The notes read, in part:

He was working with a sledge hammer here on 05/27/07 and felt a strain in what he calls his lower back. He is tender actually over the left sacroiliac with some radiation of pain into the buttocks but no further radicular symptoms, weakness or paresthesia. He has a history of lumbar disk disease with surgery. He takes Aleve and this has helped a little.<sup>3</sup>

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<sup>2</sup> P.H. Trans. at 12.

<sup>3</sup> Parris Depo., Ex. 1.

That progress note does not mention an injury or incident occurring at work. The doctor advised claimant to continue taking Aleve and to follow up if his symptoms worsened or persisted.

An encounter form, which was presumably prepared by a nurse on May 30, 2007, indicated the sledgehammer incident occurred on *May 20, 2007*. That section of the encounter form was crossed out.

On June 18, 2007, claimant returned to Dr. Parris. The progress notes from that date do not address the cause of claimant's low back pain as they merely indicate claimant's problem was low back pain with chronic degenerative arthritis. The notes also indicate at that point in time the pain was radiating down claimant's *right* leg below his knee. But those progress notes also indicated claimant did not want to consider either surgery or an MRI at that time. The June 18, 2007, encounter form again noted the date of the hammer incident was May 20, 2007, at home. But the form also indicates the payment method as "occ."<sup>4</sup>

When Dr. Parris next saw claimant on June 20, 2007, the doctor did not prepare a progress note as claimant was not charged an office visit. The doctor was not certain if that visit pertained to claimant's low back or to another problem.

On July 2, 2007, claimant saw Dr. Parris for the final time. By that time, claimant had undergone an MRI, which revealed a protruding disk. The July 2, 2007, progress note indicates claimant was having increased difficulty and back pain from a May 17, 2007, work injury. Those notes read, in part:

He has been having increasing difficulty with intolerable back pain. He injured it at work on 05/17/07. I saw him thereafter. He had some degenerative arthritic problems and our hope was that he did not have a new problem but now he is having radicular symptoms radiating down below his knee with paresthesia and pain of a new nature. And indeed, MRI comes back showing new injury from his work of lifting and manual labor on 05/17/07. See below.

Tenderness to palpation of the lower back. MRI showing bulging disk on the left with impingement. [H]e has a consultation with neurosurgeon on 07/13/07. In my opinion, this is a workman's comp related injury.<sup>5</sup>

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<sup>4</sup> *Id.*, Ex. 6.

<sup>5</sup> *Id.*, Ex. 3.

The encounter form prepared on July 2, 2007, indicates claimant was injured lifting at work on May 17, 2007. Again, "occ" appears on the form near the area for noting the method of payment.

Claimant testified the increased back symptoms he experienced from the hammer incident returned to the level they were before he hammered the lathe into the ground. Moreover, he also testified he told Dr. Parris about being injured at work. And he told the doctor about the hammer incident as an example of the activities that were bothering his back.

Q. (Mr. Phalen) Were you describing to the doctor, Dr. Parris -- Well, first of all, were you describing to Dr. Parris the ongoing problems you were having there at work at S & W every time that you saw him? Did you also tell him that?

A. (Claimant) Yes. I explained to the nurse the reason I was in there is when I was driving that stake in the ground for my garden I had already been hurt at work, and the reason I was in there is because I knew I had something more than a pulled muscle.

Q. You had hurt yourself at work, and you felt with the simple act of driving the stake into the ground you shouldn't have that much pain?

A. Yes.

Q. That's why you described the sledge hammer incident?

A. Yes.

Q. You told them about the work injury?

A. Yes.

Q. What they chose to put down is what they choose to write down; correct?

A. Yes.

MR. PHALEN: That's all.

THE COURT: Did you mention using the sledge hammer to Steve Burnett? Did you talk to him about that at all?

A. Yes.

THE COURT: Why? Why did that come up with him?

A. Well, because I thought I just had a pulled muscle, and then I told him that when I was driving that stake in I knew right then I had something more than just a pulled muscle.

THE COURT: What felt different when you were driving the stake in?

A. Just a little sharper pain for a minute.

THE COURT: A sharper pain where?

A. In my low back and down my leg, the left leg.

THE COURT: Had your leg hurt before then?

A. Yes.

THE COURT: That only lasted a minute?

A. Well, it didn't last -- It lasted more than a minute. After you go in the house and rest awhile, then it went away.

THE COURT: When did that happen? Do you remember what day that was?

A. With the hammer?

THE COURT: Yes.

A. It was a Sunday on the 27th.

THE COURT: Okay. So how did you feel the next day? Are [you] worse than you had been before the next Monday?

A. I was the same until I went to work. Then, you know, when I go to doing all that heavy lifting and bending, it just got worse and worse.<sup>6</sup>

There are legitimate questions concerning the accuracy of the medical records. The history of the hammer incident on the first encounter form has been crossed out. The date of the hammer incident on the two encounter forms is inconsistent with the initial progress note. The progress note indicates claimant was experiencing radiating pain down the right leg, when it is the left leg that is symptomatic. Moreover, the progress notes are incomplete as they do not explain why claimant underwent an MRI on June 20, 2007, which was only two days after the progress notes indicated claimant did not want to

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<sup>6</sup> P.H. Trans. at 34-36.



consider an MRI at that time. And the “occ” notations on the encounter forms remain unexplained.

In addition, the medical notes must be considered in light of Dr. Parris’ testimony that a patient does not see the notes that are being generated and, therefore, the patient is not given an opportunity to correct any mistakes. In addition, the notes must be considered in light of claimant’s stated desire to forego claiming this injury under workers compensation.<sup>7</sup> In short, the undersigned does not believe the contents of these medical records carry much weight in determining whether claimant was injured at work. Conversely, the doctor’s progress notes are enlightening as they establish Dr. Parris was attempting to determine whether claimant’s symptoms were related to his preexisting back condition, which included two previous lumbar disk surgeries,<sup>8</sup> or whether they resulted from a new injury.

Claimant has sustained a serious injury to his back. Claimant’s medical expert, Dr. Edward J. Prostic, recommends trying conservative treatment before trying additional epidural steroids or a low back fusion.

This Board Member believes and finds it is more probably true than not that claimant injured his back performing the heavy, physical work he performed for respondent rather than hammering a thin wooden lathe into the ground. When considering the evidence compiled to date, claimant’s testimony is credible and the undersigned is persuaded by that testimony. Consequently, this Board Member concludes claimant initially injured his back at work lifting and handling 280-pound paving stones. Furthermore, the undersigned finds that claimant’s work for respondent following the initial lifting incident further aggravated and worsened his low back injury and that such work comprised repetitive traumas to the low back. Finally, the undersigned finds claimant gave repeated notice of his low back injury to his supervisors through his last day of work on June 26, 2007, and, therefore, such notice was timely under K.S.A. 44-520.

Conversely, respondent has failed to prove the hammer incident on May 27, 2007, resulted in anything more than a temporary flare-up of claimant’s low back pain. Therefore, that incident does not preclude claimant from receiving workers compensation benefits for his low back injury.

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<sup>7</sup> See Bolden Depo. at 17.

<sup>8</sup> P.H. Trans., Cl. Ex. 1.

In conclusion, the September 17, 2007, Order should be reversed as claimant is entitled to receive any and all reasonable and necessary medical treatment he may require for his present low back condition.

**WHEREFORE**, the undersigned reverses the September 17, 2007, Order and holds that claimant injured his low back working for respondent, that claimant provided respondent with timely notice of the accidental injury, and that claimant is entitled to receive under the Workers Compensation Act the reasonable and necessary medical treatment he may require for his present low back condition.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2008.

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KENTON D. WIRTH  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
C. Anderson Russell, Attorney for Respondent and its Insurance Fund  
Kenneth J. Hursh, Administrative Law Judge